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IN THE
COURT OF APPEALS OF INDIANA

JAMES A. ALCORN, II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 81A01-0604-PC-147
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE UNION CIRCUIT COURT
The Honorable Matthew R. Cox, Judge
Cause No. 81C01-0507-PC-187 & 81C01-0507-PC-188

October 16, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

James A. Alcorn, II, appeals the post-conviction court's denial of his petition for post-conviction relief. Alcorn raises two issues, which we restate as:

I. Whether the post-conviction court abused its discretion by denying Alcorn's motion for a change of judge; and

II. Whether Alcorn was denied the effective assistance of trial counsel.

We affirm.

The relevant facts follow. On December 16, 2002, the State charged Alcorn with carrying a handgun without a license as a class A misdemeanor,[1] for events occurring on November 13, 2002. On February 5, 2003, the State charged Alcorn with operating a vehicle while intoxicated as a class A misdemeanor,[2] operating a vehicle with an alcohol concentration equivalent to at least 0.08 gram of alcohol but less than 0.15 gram of alcohol as a class C misdemeanor,[3] operating a vehicle while intoxicated as a class D felony,[4] and operating a vehicle while intoxicated as a class D felony.[5]

Alcorn pleaded guilty to operating a vehicle while intoxicated as a class A misdemeanor, operating a vehicle while intoxicated as a class D felony, and carrying a handgun without a license as a class A misdemeanor with alternate misdemeanor

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[1] Ind. Code § 35-47-2-1 (Supp. 2002) (subsequently amended by Pub. L. No. 195-2003, § 6 (eff. July 1, 2003); Pub. L. No. 98-2004, § 155 (eff. July 1, 2004)).

[2] Ind. Code § 9-30-5-2 (2004).

[3] Ind. Code § 9-30-5-1 (2004).

[4] Ind. Code § 9-30-5-3 (Supp. 2002) (subsequently amended by Pub. L. No. 82-2004, § 1 (eff. July 1, 2004)).

[5] Id.

sentencing on the intoxication convictions. The trial court accepted Alcorn's guilty plea and, pursuant to the plea agreement, entered judgment for only operating a vehicle while intoxicated as a class A misdemeanor and carrying a handgun without a license as a class A misdemeanor. The trial court sentenced Alcorn to consecutive sentences of one year suspended to probation for the handgun conviction and one year suspended to probation for the operating a vehicle while intoxicated conviction.

On July 11, 2005, Alcorn filed a petition for post-conviction relief and a motion for change of judge. The post-conviction court denied Alcorn's motion for change of judge. At a hearing on the petition for post-conviction relief, Alcorn admitted a certified document from the Indiana State Police showing that Alcorn had a valid handgun permit from December 17, 1999, to December 17, 2002. Alcorn's trial counsel testified that the State had offered a plea agreement in which the State would have dismissed the handgun charge if Alcorn pleaded guilty to operating a vehicle while intoxicated as a class D felony but that Alcorn's family did not want him to have a felony conviction. He also testified that Alcorn's family told him Alcorn had a handgun license but that Alcorn did not have the license in his possession at the time of his arrest. Alcorn testified that his trial counsel had told him that he was guilty of the handgun charge. Alcorn also admitted that he told his trial counsel he wanted to avoid having a felony conviction on his record. The post-conviction court entered findings of fact and conclusions thereon denying Alcorn's petition for post-conviction relief.

I.

The first issue is whether the post-conviction court abused its discretion by denying Alcorn's motion for a change of judge. Ind. Post-Conviction Rule 1, § 4(b) provides:

> Within ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. . . .

The denial of a motion for a change of judge under Ind. Post-Conviction Rule 1, § 4(b) is reviewed under a clearly erroneous standard. Azania v. State, 778 N.E.2d 1253, 1261 (Ind. 2002). A change of judge should be granted if the affidavits support "a rational inference of bias or prejudice." Id. We will presume that a judge is not biased against a party. Id. To rebut that presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. Massey v. State, 803 N.E.2d 1133, 1139 (Ind. Ct. App. 2004).

Alcorn argued in his motion and affidavit that the post-conviction court judge was biased and prejudiced against him because the judge had previously found him guilty of other offenses and probation violations, the judge was a close personal friend of the prosecuting attorney, the judge had previously practiced law with the prosecuting attorney's son, the judge had previously worked for the deputy prosecuting attorney's

husband, and Alcorn's father was a member of the County Council and had voted on issues involving the court's budget and a court employee.

As for Alcorn's contentions regarding the post-conviction court's previous rulings, "[a]dverse rulings on judicial matters do not indicate a personal bias that calls the trial court's impartiality into question." Harrison v. State, 707 N.E.2d 767, 790 (Ind. 1999), reh'g denied, cert. denied, 529 U.S. 1088, 120 S. Ct. 1722 (2000). As for his remaining contentions, "[m]erely asserting bias and prejudice does not make it so." Massey, 803 N.E.2d at 1138. There is nothing in the record to establish that the post-conviction court judge's relationships with others caused the judge to be biased or prejudiced against Alcorn. The post-conviction court's denial of Alcorn's motion for a change of judge is not clearly erroneous. See, e.g., Allen v. State, 737 N.E.2d 741, 745 (Ind. 2000) (holding that the involvement of the judge's wife in an organization devoted to preventing domestic abuse and to providing shelter for its victims, the judge's personal appearance at local radio phone-a-thon for such organization, and the judge's actions in setting defendant's bail higher than that requested by the state did not give rise to rational inference of bias or prejudice on part of the judge).

II.

The next issue is whether Alcorn was denied the effective assistance of counsel. Before discussing Alcorn's allegation of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for

relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Id. Moreover, if a petitioner is convicted pursuant to a guilty plea and later claims that his counsel rendered ineffective assistance because counsel overlooked or impaired a defense, the petitioner must show that a defense was indeed overlooked or impaired and that the defense would have likely changed the outcome of the proceeding. Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001).

Here, Alcorn argues that his trial counsel was ineffective because he should have filed a motion to dismiss the carrying a handgun without a license charge and should have advised Alcorn that he was not guilty of the offense. According to Alcorn, he had a valid handgun license at the time he was arrested but simply did not have the license with him at that time. During the post-conviction hearing, Alcorn presented evidence that he had a valid handgun license at the time of his arrest.[6] Thus, Alcorn argues the charge should have been dismissed pursuant to Ind. Code § 35-47-2-24(b), which provides: "Whenever a person who has been arrested or charged with a violation of [Ind. Code § 35-47-2-1] presents a valid license to the prosecuting attorney . . . , any prosecution for a

[6] Ind. Code § 35-47-2-1 provides: "Except as provided in section 2 of this chapter, a person shall not carry a handgun in any vehicle or on or about his person, except in his dwelling, on his property or fixed place of business, without a license issued under this chapter being in his possession."

violation of [Ind. Code § 35-47-2-1] shall be dismissed immediately, and all records of an arrest or proceedings following arrest shall be destroyed immediately."

The post-conviction court rejected Alcorn's argument based upon Harvey v. State, 498 N.E.2d 1231 (Ind. 1986), reh'g denied. There, the defendant pleaded guilty to robbery, carrying a handgun without a license, and dealing in sawed-off shotguns. Harvey, 498 N.E.2d at 1232. The defendant later filed a petition for post-conviction relief, which the post-conviction court denied. Id. The defendant argued that his guilty plea was involuntary because the factual basis for his guilty plea was insufficient to show that the guns were in his possession. Id. at 1232-1234. After reviewing the transcript of the guilty plea hearing, the Indiana Supreme Court held:

> It is apparent that the court recognized from appellant's initial answers the potential for an insufficient factual basis. At that point appellant's counsel interjected and questioned appellant in such a fashion as to establish constructive possession of the weapons. Counsel also pointed out the potential problems of proving the elements of the offenses, but nevertheless requested the court to accept the plea due to the beneficial nature of the State's sentencing recommendation. Accordingly, appellant cannot successfully claim his plea was involuntary or unintelligent when he was aware of the possible deficiencies in the factual basis and urged the court to accept his plea.

Id. at 1235.

We conclude that Harvey is applicable here. Prior to the plea, Alcorn, his attorney, and apparently the prosecuting attorney were aware that Alcorn had a license to carry a handgun. Alcorn's trial counsel testified at the post-conviction hearing that the State had offered a plea agreement in which the State would have dismissed the handgun charge if Alcorn pleaded guilty to operating a vehicle while intoxicated as a class D

felony. However, Alcorn had indicated to his attorney that he would not plead guilty to a felony. Alcorn then agreed to plead guilty to carrying a handgun without a license as a class A misdemeanor, operating a vehicle while intoxicated as a class D felony, and operating a vehicle while intoxicated as a class A misdemeanor and received alternate misdemeanor sentencing. During the guilty plea hearing, Alcorn admitted that he was guilty of carrying a handgun without a license as a class A misdemeanor as described in the probable cause affidavit and the charging information.[7]

"Defendants should have the option . . . to plead guilty if they so choose." Trueblood v. State, 587 N.E.2d 105, 108 (Ind. 1992), reh'g denied, cert. denied, 506 U.S. 897, 113 S. Ct. 278 (1992). "They may want to do so for a multitude of reasons that may be favorable to them." Id. Here, Alcorn received a significant benefit from his plea by avoiding a felony conviction. See Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004) ("A defendant 'may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence.'"); Stites v. State, 829 N.E.2d 527, 529 (Ind. 2005) (rejecting the defendant's argument that her plea agreement, conviction, and sentence were invalid because the trial court lacked statutory authority to enter consecutive sentences where the defendant received a significant

[7] Although the federal constitution does not prohibit the state from accepting a guilty plea where the defendant maintains his innocence, North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970), it has long been the law in Indiana that a plea of guilty made while the defendant continues to profess his innocence is not a valid plea. Ross v. State, 456 N.E.2d 420 (Ind. 1983). In Ross, the court specifically held "a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error." Id. at 423. There is no indication that Alcorn was both pleading guilty and maintaining his innocence at his guilty plea hearing.

benefit from the plea agreement). After striking this favorable bargain, Alcorn cannot now complain that he should not have been convicted of carrying a handgun without a license. Likewise, Alcorn's claim of ineffective assistance of counsel fails. See, e.g., Stites, 829 N.E.2d at 529 (holding that the defendant's claim of ineffective assistance of counsel failed because the claim was "merely a subset of [her] claim that her plea agreement was void because it called for consecutive sentences"). The post-conviction court's denial of Alcorn's petition for post-conviction relief is not clearly erroneous.

For the foregoing reasons, we affirm the post-conviction court's denial of Alcorn's petition for post-conviction relief.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur